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No. 95-506

In the Supreme Court of the United States

OCTOBER TERM, 1995

LUZVISAMINDA ABLANG, PETITIONER

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether Section 205 of the Nationality Act of 1940, which provides rules for the transmission of United States citizenship to certain children born abroad to unmarried parents, violates the equal protection component of the Fifth Amendment's Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 52 F.3d 801. The orders of the district court (Pet. App. 56-59) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1995. A petition for rehearing was denied on June 27, 1995. Pet. App. 79. The petition for a writ of

certiorari was filed on September 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the Philippines on June 8, 1946. Pet. App. 4. The Philippines were at that time an "outlying possession" of the United States. *Id.* at 5 n.1. Petitioner's mother was a Philippine national, and her father was a United States serviceman stationed in the Philippines. *Id.* at 4. Petitioner's parents were not married, and her father returned to the United States before her birth. *Id.* at 5. Petitioner was raised by a Philippine family, and she did not become aware of the circumstances of her birth until her natural mother reestablished contact with her some time after her graduation from high school. In 1981, when she was in her mid-30's, petitioner wrote to her father at an old address given to her by her mother. He responded, and he and petitioner met for the first time in 1987. *Ibid.*

In 1990 petitioner applied for a certificate of citizenship from the Immigration and Naturalization Service (INS), and in 1991 she applied for a U.S. passport from the Department of State. Pet. App. 5. Petitioner submitted declarations from her father acknowledging paternity, along with the results of genetic testing establishing a 95.77% probability of paternity. The INS and the State Department denied petitioner's applications, on the ground that paternity had not been established while she was still a minor, as required by Section 205 of the Nationality Act of 1940, ch. 876, 54 Stat. 1139-1140 (1940 Act). *Ibid.*

2. Petitioner then filed this action seeking a declaratory judgment that she is a United States

citizen. Pet. App. 6. After a hearing, the district court granted petitioner's motion for summary judgment. *Id.* at 56-58. The court's order incorporated by reference (*id.* at 57) a transcript of the hearing (*id.* at 30-55), at which the court had stated its reasons for granting petitioner's motion. First, the court interpreted Section 201 of the 1940 Act, 54 Stat. 1138-1139, as granting United States citizenship at birth to any child born to a citizen parent, so that petitioner had acquired U.S. citizenship at birth. Pet. App. 31, 35. The court then reasoned that Section 205 of the Act "t[ook] * * * away" the citizenship so acquired, if the citizen parent was the father (rather than the mother) and if paternity was not established during the child's minority. Pet. App. 31-32, 35. The court concluded that Section 205 violated equal protection principles both as a "sexist discrimination" and because "the legitimation requirement imposed on the child is not rationally related to any governmental purpose." *Id.* at 32.

3. The court of appeals reversed. Pet. App. 1-14. The court rejected (*id.* at 8) the district court's conclusion that Section 205 of the 1940 Act operates by "revoking a previous grant of citizenship" made by Section 201. Instead, the court held that "citizenship does not inhere under the Act unless and until paternity is established, provided this takes place by the age of majority." Pet. App. 8. The court thus framed the issue as whether Section 205's rules for the transmission of citizenship distinguish impermissibly between classes of children born abroad to one citizen parent and one alien parent, either on the basis of the child's legitimacy, or on the basis of the citizen parent's gender. Pet. App. 8.

The court of appeals held that, under this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), the distinctions drawn by Congress in Section 205 of the 1940 Act must be sustained if they could be supported by any "facially legitimate and bona fide reason." Pet. App. 9. The court equated that standard with the "rational basis" standard generally employed in equal protection analysis. *Ibid.* The court concluded both that it was reasonable for Congress, in a statute dealing with transmission of citizenship by birth, to require proof of descent from a citizen parent, and that a distinction between citizen mothers and citizen fathers could be justified in this context on the ground that "in most cases there is a reasonable expectation that [an] illegitimate child's maternal descent will be easier to trace than her paternal descent." *Id.* at 12. With respect to the requirement that paternity be established during the child's minority, the court accepted (*id.* at 12-13) the government's arguments that "proof may be harder to obtain as the years go by," and that Congress could rationally have determined that a child born abroad to an unmarried alien mother would be more likely to have early and close ties to the United States if the child's relationship to a U.S. citizen father was established while the child was still a minor.

ARGUMENT

1. In *Fiallo* v. *Bell*, 430 U.S. 787, 794-795 (1977), this Court reaffirmed that judicial review of immigration and nationality legislation is limited to determining whether a challenged provision is supported by "a facially legitimate and bona fide reason." Petitioner argues (Pet. 8-12), however, that the court of appeals erred in declining to apply "intermediate

scrutiny" in resolving her equal protection claim, either because her case "involves the rights of a U.S. citizen parent to transmit citizenship" or because "petitioner was indisputably a United States national at the time of [her] birth." Pet. 9.

As the court of appeals concluded (Pet. App. 10 n.4), petitioner has no standing to assert rights personal to her father. See, *e.g.*, *Powers* v. *Ohio*, 499 U.S. 400, 410-411 (1991); *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500, 509-510 (1975). Moreover, this Court has previously rejected similar efforts to expand "the limited scope of judicial inquiry into immigration legislation" on the ground that a particular provision also affects the interests of citizen litigants. *Fiallo*, 430 U.S. at 792, 794-795 & n.6; see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 767-769 (1972); *Wauchope* v. *Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993); *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990).

It is true that petitioner was born in the Philippines at a time when citizens of the Philippines were non-citizen "nationals" of the United States. Nationality Act of 1940 (1940 Act), ch. 876, § 101(b)(2), 54 Stat. 1137 (*reprinted at* Pet. App. 22); *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524, 525 (9th Cir. 1956). As petitioner points out elsewhere (Pet. 25), however, at the time of her birth in June, 1946, federal law also specifically provided that Philippine citizens were to be treated as aliens for purposes of this country's immigration laws. Philippine Independence Act, ch. 84, § 8(a)(1), 48 Stat. 462 (1934) (*reprinted at* Pet. App. 15); see, *e.g.*, *Madrona Banez* v. *Boyd*, 236 F.2d 934, 936 (9th Cir. 1956). The proclamation of Philippine independence was issued less than one month after

petitioner's birth. At that time, Section 14 of the Philippine Independence Act, 48 Stat. 464, became operative. That Section provided that upon the final and complete withdrawal of United States sovereignty over the Philippine Islands, "the immigration laws of the United States (including all the provisions there-of relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." See *Rabang* v. *Boyd*, 353 U.S. 427, 429-430 (1957). Petitioner did not apply for a certificate of U.S. citizenship until 1990, some 34 years later.

In any event, the fact that petitioner was briefly covered by a federal law that classified all persons born in U.S. possessions and owing ultimate allegiance to the United States as U.S. "nationals" provides no basis for heightened constitutional scrutiny of Congress's separate choices with respect to the quite different question of which such persons, not having been born within the United States itself, would be accorded U.S. citizenship by virtue of their descent. As to that question, this Court has repeatedly made clear that "over no conceivable subject is the legislative power of Congress more complete." *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)); see also *id.* at 796; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898).

2. The court of appeals therefore correctly held that *Fiallo*'s "facially legitimate and bona fide reason" standard applies in this case. Petitioner argues (Pet. 12-19) that, even under that standard, Section 205 of the 1940 Act must be struck down

because it lacks a rational basis.[1] As the court of appeals held (Pet. App. 12-13), however, Section 205 is justified on the same grounds that this Court recognized as permissible in *Fiallo*.

Fiallo involved a provision that granted preferential immigration status to the "children" or "parents" of United States citizens. *Fiallo*, 430 U.S. at 788. In the case of children born outside marriage, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the child turned 18 and while the child was in the legal custody of the legitimating parent. *Id.* at 788-789 & n.1. The petitioners alleged that the provision discriminated unlawfully on the basis of sex, marital status, and illegitimacy, denied them due process by establishing "an unwarranted conclusive presumption," and burdened various fundamental rights. *Id.* at 791.

In rejecting those arguments, this Court identified two "facially legitimate and bona fide reason[s]" (*Fiallo*, 430 U.S. at 794) for Congress's decision not to extend preferential status to non-legitimated children and their natural fathers: "a perceived absence in most cases of close family ties," and "a concern with the serious problems of proof that usually lurk in

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[1] The court below has equated the "facially legitimate and bona fide reason" standard with the "rational basis" test used in equal protection analysis of domestic laws. Pet. App. 9, citing *Wauchope* v. *Department of State*, 985 F.2d at 1414 n.3. In our view, the *Fiallo* standard is less rigorous than the rational basis test. Cf. *Fiallo*, 430 U.S. at 799 n.8 (contrasting immigration and domestic contexts). The point is not critical in this case because the court of appeals held that Section 205 satisfies the rational basis test.

paternity determinations." *Id.* at 799. The Court noted that Congress might have given "substantial weight" to the "inherent difficulty of determining the paternity of an illegitimate child," which was "compounded when it depends upon events that may have occurred in foreign countries many years earlier." *Id.* at 799 n.8.

Recognizing that "there are widely varying relationships and degrees of kinship," the Court held in *Fiallo* that "[i]n the inevitable process of 'line drawing,'" it was "appropriate for Congress to consider not only the nature of [kinship] relationships but also problems of identification, administration, and the potential for fraud." 430 U.S. at 795 n.6. The Court's opinion acknowledged that the law precluded relief even in cases in which a particular father and child could prove the existence and strength of their family relationship (*id.* at 798), and it noted the contentions that the provision was "based on an overbroad and outdated stereotype" and that problems of proof were not, in fact, intractable (*id.* at 799 n.9). Under the "facially legitimate and bona fide reason" standard, however, the Court held that it was "not the judicial role * * * to probe and test the justifications for the legislative decision," which "remain[ed] one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Id.* at 799 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

As the court of appeals recognized (Pet. App. 12-13), the same legislative concerns that this Court held to be "facially legitimate" in *Fiallo* support the very similar provision at issue in this case. Problems of proof and questions about the existence of close family ties that could justify denying certain limited

immigration preferences may surely also justify similar restrictions on the far more significant congressional decision to confer American citizenship on a child born abroad.[2] Petitioner's arguments to the contrary (Pet. 12-19) rely on the dissent in *Fiallo* (see Pet. 15, 18) and on principles appropriate to equal protection analysis in the domestic context. See *Fiallo*, 430 U.S. at 799 n.8 ("our cases clearly indicate that legislative distinctions in the immigration area need not be as '"carefully tuned to alternative considerations,"' *Trimble* v. *Gordon*, [430 U.S. 762,] 772 [(1977)] (quoting *Matthews* v. *Lucas*, 427 U.S. 495, 513 (1976)), as those in the domestic area.").[3] Petitioner identifies no conflict in authority on the issue involved here, however, and she offers no persuasive reason for this Court to revisit its conclusion in *Fiallo* that challenges to the assumptions and choices underlying Congress's immigration-related line-

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[2] The history of the 1940 Act in fact indicates concern with the problem of transmission of citizenship to foreign-born children with little connection to this country. See 86 Cong. Rec. 11,948 (1940) (remarks of Rep. Rees) ("substantive changes [in the nationality laws] are necessary in connection with certain rights, with a view to preventing persons who have no real attachment to the United States from enjoying the high privilege of American nationality.").

[3] Petitioner also contends (Pet. 19-22) that Section 205 is unconstitutional because it creates an "irrebuttable presumption" (Pet. 21) based on her illegitimacy and her father's sex. This Court rejected the same argument in *Fiallo*. 430 U.S. at 791, 798-799; cf., *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977) (upholding use of categorical criteria in determining eligibility for government benefits); *Weinberger* v. *Salfi*, 422 U.S. 749, 785 (1975) (same).

drawing "should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.[4]

3. Finally, petitioner argues (Pet. 22-26) that she should be recognized as a citizen based on Section 201(i) of the 1940 Act (added by Act of July 31, 1946, ch. 708, 60 Stat. 721; *reprinted at* Pet. App. 26-27), which applies to persons "born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who * * * served * * * honorably in the armed forces of the United States" during World War II. At the time of petitioner's birth, however, the Philippines were an "outlying possession[]" of the United States. Pet. App. 5 n.1, 38; see *id.* at 22 (1940 Act § 101(e), 54 Stat. 1137).[5] Thus, even if we assume that petitioner could be excused for not complying with the residency requirements set out in Section 201(i) as a condition for retaining citizenship (see Pet. App. 27), she never

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[4] As the court of appeals noted (Pet. App. 10 n.3), since *Fiallo* was decided, Congress has amended the provision at issue in that case "in terms that equalize the relationship between natural mothers and fathers and their children." See 8 U.S.C. 1101(b)(1)(D). By contrast, current law pertaining to transmission of citizenship contains a legitimation provision very similar to the 1940 Act provision at issue in this case. See 8 U.S.C. 1409. Congress revised that provision in some detail as recently as 1986, tightening some of its requirements and retaining the distinction between citizen fathers and citizen mothers. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3657, as amended by the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

[5] Petitioner did not appeal the district court's ruling (Pet. App. 38) that Section 201(i) did not apply for this reason, and she did not raise that provision in the court of appeals as an alternative ground for affirmance.

qualified for recognition as a citizen under that Section. Neither the court of appeals' characterization of petitioner's mother as an alien (rather than as a non-citizen national, see *Resurreccion-Talavera* v. *Barber*, 231 F.2d at 525), see Pet. 23, nor the Philippine Independence Act's provisions treating Philippine citizens as aliens for most immigration purposes, changes that result.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys

NOVEMBER 1995

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[6] Because the court of appeals rejected petitioner's constitutional challenge to Section 205, it did not reach the government's supplementary contention that a district court's remedial powers do not extend to conferring citizenship in derogation of a limitation imposed by Congress, even if that limitation is held to be unconstitutional. See *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [Congress's] limitations.").